IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 181

THE F. W. FITCH COMPANY, A CORPORATION,
Petitioner,

V.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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The F. W. Fitch Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on March 29, 1944, reversing a decision of the District Court of the United States for the Southern District of Iowa and remanding for further proceedings in conformity with its opinion.

OPINIONS BELOW.

The opinion of the District Court (R. 15-23) is reported in 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34-38) is reported in 141 F. (2d) 380.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 29, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. Section 347).

QUESTION PRESENTED.

Whether Section 619(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267; 26 U. S. C. A. Internal Revenue Acts, p. 618) authorized the deduction of advertising and selling expenses in computing the price upon which is based the manufacturers' excise tax imposed by Section 603 of the Act (c. 209, 47 Stat. 169, 261; 26 U. S. C. A. Internal Revenue Acts, p. 608).

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 10-11.

STATEMENT.

The material facts as found by the District Court are substantially as follows:

The F. W. Fitch Company, petitioner, is and was during the period from October 1, 1936 and throughout the period ending June 30, 1939, a corporation existing under the laws of the State of Iowa. (R. 21) During such period the petitioner was subject to a manufacturer's excise tax under Sections 603 and 619(a) of the Revenue Act of 1932. It was engaged in the manufacture and sale of cosmetics and toiletries which were subject to the manufacturer's excise tax, some at the rate of 10% and some at the rate of 5%. For said period the petitioner duly filed monthly manufacturer's excise tax returns, reporting thereon tax lia-

bility in the aggregate amount of $319,170.48 which was assessed and paid on the dates of filing of said monthly returns. (R. 24)

Petitioner divided its customers into five classifications; namely, barber and beauty supply dealers, chain and syndicate stores, customers purchasing a line of cosmetics known as "Beauty by Fitch", wholesale and retail drug stores, and purchasers of special label merchandise. (R. 25) On sales to drug wholesalers and to purchasers of special label merchandise, petitioner added the tax to the selling price and no refund thereof was claimed. (R. 26) A large proportion of petitioner's sales was made to the other classes of customers. All such sales were made at arm's length and petitioner did not add the manufacturer's excise tax to the selling price but absorbed and bore the burden of same. (R. 25)

In arriving at the base upon which the tax was levied and assessed, the petitioner did not deduct from its selling price the amount expended in advertising and selling said products. The amount of selling and advertising expense chargeable to sales with respect to which petitioner absorbed and bore the burden of the tax and which were subject to excise tax at the rate of 5%, was the sum of $574,796.67. The amount of advertising and selling expense properly chargeable to such sales which were taxable at the rate of 10%, was the sum of $236,321.06. No part of this selling and advertising expense was deducted in calculating the excise tax paid on such sales. (R. 26)

The District Court found and held that the above selling and advertising expenses were deductible in computing the selling price upon which the excise tax was based. Accordingly said court found that for the period from October 1, 1936 to and including June 30, 1939, petitioner paid the sum of $59,718.88 in excess of the amount of excise taxes owed by petitioner. (R. 27) Judgment for the overpay-

ment, with interest, was entered August 10, 1943 for $79,028.77. (R. 28)

The Circuit Court of Appeals for the Eighth Circuit held that advertising and selling expenses are not deductible in computing the excise tax base under Section 619(a) of the Revenue Act of 1932. On March 28, 1944 said court reversed the judgment of the District Court remanding the case with directions to enter a judgment dismissing the petitioner's complaint. (R. 34-38)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that advertising and selling expenses are not deductible by a manufacturer of cosmetics and toilet preparations under section 619(a) of the Revenue Act of 1932 in determining the sale price upon which the manufacturer's excise tax is to be levied and assessed under section 603 of the Revenue Act of 1932.

(2) In holding that section 619(a) of the Revenue Act of 1932 which authorized the exclusion of a "transportation, delivery, insurance, installation or other charge" in determining the sale price for the purpose of the tax, could not be construed as authorizing a manufacturer to deduct advertising and selling expense as an "other charge".

(3) In holding that the rule of *ejusdem generis* must be applied to construe section 619(a) of the Revenue Act of 1932 with respect to the phrase "or other charge".

(4) In any case, if the rule of *ejusdem generis* is to be applied, in failing to hold that section 619(a) of the Revenue Act of 1932 divides the elements entering into the sales price upon which the tax is to be levied into two categories, i. e. manufacturing costs and distribution costs, and in holding that selling and advertising expenses are not such distribution costs as are specifically excluded by the Act.

(5) In holding that adoption of the Revenue Act of

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

SEC. 621. CREDITS AND REFUNDS.

* * *

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

APPENDIX B.

Pertinent Portions of the Decision in

Campana Corporation v. Harrison,
114 F. (2d) 400.

Circuit Court of Appeals, Seventh Circuit
August 14, 1940.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; Philip L. Sullivan, Judge.

Action by the Campana Corporation against Carter H. Harrison, individually and as Collector of Internal Revenue for the First Collection District of Illinois, to recover additional manufacturer's excise taxes paid under protest. From a judgment for plaintiff, the defendant appeals.

Reversed and remanded, with directions.

Before MAJOR, TREANOR, and KERNER, Circuit Judges.

KERNER, Circuit Judge.

This is an action brought against the revenue collector for the United States to recover additional manufacturer's excise taxes paid under protest. The plaintiff filed its Manufacturer's excise tax return under the law and paid the tax. Revenue Act of 1932, 47 Stat. 259, ch. 209, secs. 601, *et seq.*, 26 U. S. C. A. Int. Rev. Acts, page 603, *et seq.* Then the Commissioner of Internal Revenue assessed an additional tax and this tax the taxpayer paid under protest. Timely application for a refund of the additional amount paid was made and denied. Thereupon the taxpayer sued in the District Court and the Court (sitting without a jury) found for the taxpayer. The defendant Collector appealed to this Court seeking a reversal of the judgment.

Campana Corporation is engaged in the manufacture and sale of a toilet preparation or cosmetic known as "Cam-

> may be deducted from the basis of the sale price of the Campana Sales Company. Since our opinion in that case, Congress has repealed entirely the statute imposing the 'manufacturers' excise tax here involved. Before that Congressional action and subsequent to the attachment of the taxes here involved, Congress had amended the statute so as to permit the deduction of these expenses. 53 Stat. 862, 863, 26 U. S. C. A. Int. Rev. Code, Section 3401. We thought the statute was capable of a construction that would permit such deductions, authorized by the amendment, before the amendment was passed. We still think so. The fairness of this construction is borne out by subsequent events. We think Congress intended all along that these expenses were deductible as "other charges" within the meaning of Sec. 619(a), 47 Stat. 169, 267, 26 U. S. C. A. Int. Rev. Code, Section 3441(a). We are not disposed to disturb our decision in the former case.

It thus appears that there is a direct conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar and the decisions of the Circuit Court of Appeals for the Seventh Circuit in the *Campana* cases, *supra;* also there is a direct conflict between the decision of the Court of Claims in the case of *Ayer Co. v. United States, supra,* and the said decisions of the Circuit Court of Appeals for the Seventh Circuit. Inferentially there is a conflict between the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Bourjois, Inc. v. McGowan, supra,* and both the Circuit Court of Appeals for the Eighth Circuit in the instant case and the Court of Claims in the *Ayer* case.

In view of the confusion and uncertainty which exists because of the conflicting opinions of the different Circuit Courts of Appeal it is respectfully urged that this petition should be granted.

(2) The decision of the Circuit Court of Appeals in this case decides a federal question in a way probably in conflict with applicable decisions of this court.

In its opinion (R. 37) the court below said:

> In the Revenue Act of 1939, enacted June 29, 1939 [c. 247, Section 3(a), 53 Stat. 863; 26 U. S. C. A. Internal Revenue Acts, pages 1167-1168], Congress provided that, in determining the selling price of articles subject to the manufacturers' excise tax on toilet preparations, there should be excluded "a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling," but made this amendment effective "only with respect to sales made after the date of the enactment of this Act." The changes made in the statute in 1939 are not, we think, of controlling significance in determining the intent of Congress in enacting Section 619(a) of the Revenue Act of 1932. Compare *Helvering v. Rebsamen Motors, Inc., supra.* These changes indicate, however, that it was not the understanding of the Congress which made them that prior to June 29, 1939, advertising and selling costs were deductible in determining the selling price of an article subject to the excise tax.

This court, in *Haggar Co. v. Helvering*, 308 U. S. 389, held that a later amendment cannot be employed to ascertain what Congress intended by a prior law. The language of this court in its opinion is as follows (p. 400):

> If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction.

In view of the above quoted language of this court it is submitted that the changes made in the Revenue Act of 1939 may not be taken to indicate what the intent of the earlier Congress may have been. It would be just as logical to con-

clude that the 1939 Congress was merely stating in statutory form what had always been the correct interpretation of the earlier statute.

(3) In this case the Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this court. The question presented involves the Federal revenues and, unless it is settled, taxpayers in one jurisdiction may be afforded relief while taxpayers in other jurisdictions will be denied relief even though the facts and circumstances of their respective cases are identical.

CONCLUSION.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

ARNOLD F. SCHAETZLE,
JAMES M. STEWART,
Counsel for Petitioner.

June, 1944

APPENDIX A.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment;

1939, which provided that in determining the selling price of articles subject to the excise tax on toilet preparations, there should be excluded "* * * expenses of advertising and selling", indicated that it was not the understanding of the Congress which passed the Revenue Act of 1932, that advertising and selling expenses were deductible.

(6) In concluding that the legislative history of section 619(a) of the Revenue Act of 1932 shows no clear congressional purpose to exclude advertising and selling costs in determining the price of articles subject to the excise tax.

(7) In reversing the decision of the District Court of the United States for the Southern District of Iowa and in remanding the cause with directions to dismiss petitioner's complaint.

REASONS FOR GRANTING THE WRIT.

(1) The decision below fails to correctly interpret Section 619 of the Revenue Act of 1932 and is in direct conflict with the decisions of the Circuit Court of Appeals of the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400, 411, and *Campana Corporation v. Harrison*, 135 F. (2d) 334, 336. In its opinion the Court below recognizes the conflict by making the following statement (R. 38):

> While we dislike to differ with the Circuit Court of Appeals of the Seventh Circuit with respect to the construction of Section 619(a) of the Revenue Act of 1932, it is our opinion that that section reasonably may not be construed as authorizing a manufacturer to deduct advertising and selling expenses in determining the prices of his products subject to the excise tax.

The pertinent portions of the decision of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400 is set out in Appendix B, pp. 12-17.

In the case of *Bourjois, Inc. v. McGowan*, 12 F. Supp. 787, the District Court of the United States for the Western District of New York said (p. 793):

> To allow salesmen's commissions and costs and expenses of advertising and selling to be excluded from the sale price, the amount thereof, under Section 619(a), *supra*, must be established to the satisfaction of the Commissioner and that means there must be some basis on which a deduction can be made on account of such expenses. There is nothing in the record to show the amount of such commissions and costs or what the actual expenses were. We, therefore, are not required to determine whether any deduction should be made. The determination as made by the Commissioner without any proof of actual expense of sales is right.

The Circuit Court of Appeals for the Second Circuit in *Bourjois, Inc. v. McGowan*, 85 F. (2d) 510, affirmed the above decision without discussion of the above quoted language of the District Court. It therefore appears that the Circuit Court of Appeals for the Second Circuit may also be of the opinion that advertising and selling expenses would be deductible if the amounts thereof were properly proven. This court denied certiorari. 57 S. Ct. 753, 300 U. S. 682.

In the case of *Ayer Co. v. United States*, 38 F. Supp. 284, the Court of Claims ruled that advertising and selling expenses are not deductible under Section 619(a) of the Revenue Act of 1932 in arriving at the selling price upon which the tax is based. This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corporation v. Harrison*, 114 F. (2d) 400. Following said decision of the Court of Claims the Circuit Court of Appeals for the Seventh Circuit reaffirmed its decision in the case of *Campana Corporation v. Harrison*, 135 F. (2d) 334 in the following language (p. 336):

> The Commissioner has asked us to overrule *Campana Corporation v. Harrison*, 7 Cir., 114 F. 2d 400, insofar as it holds that the selling and advertising costs

pana's Italian Balm," with its principal place of business at Batavia, Illinois. Since the date of the taxing statute (June 21, 1932) this face and hand lotion has been subject to a manufacturer's excise tax equivalent in amount to 10% of "The price for which so sold." Section 603 of the Revenue Act of 1932. The statute requires monthly tax returns and payments, and in the instant case the tax month in controversy is July, 1933.

Campana Corporation was organized in 1926 and prior to July 1, 1933 was engaged both in the manufacture and the distribution (including advertising and sales promotion) of "Campana's Italian Balm." On July 1, 1933, a contract for the exclusive distribution and sale of Campana's Italian Balm went into effect. By this sales contract the Campana Corporation agreed to sell its product exclusively to E. M. Oswalt (60% stockholder of Campana Corporation) or his corporate transferee. As sales price for the product Oswalt agreed to pay an amount equal to the cost of production of the artcle plus 39% of this cost. Then Oswalt organized the Campana Sales Company and on July 1, 1933 transferred the sales contract to it.

* * *

Tax basis. * * *

When the manufacturers' excise tax bill was reported out of the Committee on Ways and Means, it was explained to the many Representatives on the floor of the House. Mr. Crisp, acting Chairman of the Committee, emphasized that the tax was a manufacturer's tax levied not on the retail price but on the manufacturer's wholesale price. That the manufacturer's price to the wholesalers was to be the starting point of tax computation, appeared again and again in the explanation of the bill. See Vol. 75, Congressional Record, pp. 5693, 5694, 5789 and 5904. The Senate was told the same thing by its Committee on Finance. "The manufacturer's excise tax proposal is to levy the tax once, upon

the article in its finished state, but at its wholesale selling price, not at the retail price." Senate Report #665; Vol. 75, Congressional Record, pp. 10085, 11361, 11657.

However, the legislators realized that not all manufactured articles passed through the hands of the wholesalers before reaching the consuming public. In these situations the legislators intended the tax basis to be the wholesale price if that price could be established. Nor did they intend the tax basis to include costs other than the normal manufacturing costs. For instance, to the question—"Does the manufacturer's price that is contemplated include salesmen's commissions?"—Mr. Crisp answered that the "Selling cost is not intended to be added." Vol. 75, Congressional Record, p. 5693. On ths point House Report #708 and Senate Report #665 plainly indicate that from the tax basis was to be excluded any charge having no connection whatever with the manufacturing process.

From the legislative history above related, it appears that (1) a manufacturer's tax was intended, (2) a price which would reflect normal manufacturing costs was to be the basis of the tax, and (3) the wholesale price adjusted if necessary to exclude non-manufacturing costs, ordinarily would be such a price. In this light the meaning of the statute becomes plain indeed. Sec. 603 imposes upon cosmetics and toilet preparations "sold by the manufacturer * * * a tax equivalent to 10 per centum of the price for which so sold." Sec. 619(b), 26 U. S. C. A. Int. Rev. Code Section 3411(b), provided that if an article is sold at retail, on consignment, or at less than the fair market price and otherwise than through an arm's length transaction, then the tax "shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof * * *." And Sec. 619(a) provides that in "determining * * * the price for which an article is sold,

there shall be included any charge * * * incident to placing the article in condition packed ready for shipment * * *. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price * * *."

In interpreting Sec. 619(a) of the statute the Treasury Department stated that "charges which have no connection with the manufacturing process * * * are to be excluded in computing the tax." Article 12 of Regulation 46, promulgated under the Revenue Act of 1932. In this connection it is to be noted that in 1939 Congress deleted the second sentence of Section 619(a) and substituted the following: "Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price * * *." 53 Stat. 862, 863, 26 U. S. C. A. Int. Rev. Code Section 3401. No legislative comment or explanation was given for the 1939 change.

It follows from what has been said that the taxpayer has failed to comply with the statute and that the Commissioner was justified under the circumstances in computing the tax on the wholesale price. We conclude therefore that the District Court erred in holding that the inter-company price represented the tax basis: its findings in this respect do not support the conclusion rendered thereon.

Selling and advertising costs. One more subject remains to be discussed. The selling and advertising expenses of the selling corporation—which pertain exclusively to the nation-wide process of marketing and distributing the taxable product—are not manufacturing costs. The evidence is that the selling corporation sells to wholesalers by promising that it will "sell what the wholesaler buys," and that the selling corporation does this very thing, in effect

selling the taxable article three times over. In this regard the taxpayer's complaint alleges that the "Commissioner erred in failing to reduce the price at which Campana Sales Company sold said articles by advertising and selling costs and expenses paid or incurred by said Campana Sales Company during July, 1933, in determining the price of articles subject to tax under the provisions of Section 603 of the Revenue Act of 1932."

At the trial the taxpayer adduced evidence which showed, and the District Court so found, that the selling and advertising costs of the Campana Sales Company amounted to $29,792.05 for July of 1933. In our discussion of the statute we stated that non-manufacturing charges were to be excluded in computing the tax. Further discussion would not add more than what was said there: the statute directs the exclusion of the selling and advertising costs (of the character here shown) from the tax basis. It is only necessary to conclude, and we so hold, that although the Commissioner had the power under the circumstances of this case to compute the tax on the established wholesale price, he erred in failing to exclude the above described selling and advertising costs from the basis employed.

Other courts have spoken on situations similar to the one at bar. *Bourjois, Inc. v. McGowan*, D. C., 12 F. Supp. 787; *Id.*, 2 Cir., 85 F. 2d 510, certiorari denied, 300 U. S. 682, 57 S. Ct. 753, 81 L. Ed. 885; *Inecto, Inc. v. Higgins*, D. C., 21 F. Supp. 418; *Concentrate Mfg. Corp. v. Higgins*, 2 Cir., 90 F. 2d 439, certiorari denied, 302 U. S. 714, 58 S. Ct. 33, 82 L. Ed. 551; *Luzier's Inc. v. Nee*, D. C., 24 F. Supp. 608; *Id.*, 8 Cir., 106 F. 2d 130 and *Albrecht & Son v. Landy*, D. C., 27 F. Supp. 65. In the other cases the taxpayer did not prevail. In the instant case the taxpayer does prevail as to two points. We do not believe that our decision conflicts with the decisions in the other cases. But if a conflict does exist, we are not disposed to follow the other courts.

The pleadings in this case raised four points: (1) Tax incidence; (2) arm's length transaction; (3) tax basis; and (4) selling and advertising expenses. As to (1), (2) and (3) the District Court made findings of fact and rendered conclusions thereon. As to (4) the District Court made a finding of fact but did not render a conclusion thereon. The conclusion as to (1) is affirmed; the conclusions as to (2) and (3) are reversed. The finding as to (4) is supported by substantial evidence, and the District Court should render the appropriate conclusion thereon. This case is reversed and remanded with directions to proceed in accordance with this opinion.